UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Raymond G. Caryl, Appellant,

v.

Department of the Treasury, Agency.

Docket Number DE0752900187-A-1

Date: April 14, 1993

Joseph L. Esposito, Tucson, Arizona, for appellant.

David P. Lindsey, El Paso, Texas, for agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The agency has petitioned for review of the May 27, 1992 addendum initial decision that granted the appellant's motion for attorney fees, reimbursable costs, and a fee enhancement. For the reasons set forth below, we GRANT the agency's petition under 5 C.F.R. § 1201.115, and AFFIRM the addendum initial decision as MODIFIED by this Opinion and Order, still GRANTING the appellant's motion for a lodestar attorney fee award and reimbursable costs, but DENYING the appellant's request for a fee enhancement.

BACKGROUND

The agency removed the appellant from the GS-13 position of Customs Pilot. The appellant filed a petition for appeal with the Board's Denver Regional Office, and he received a hearing in conjunction with his appeal. The administrative judge then issued an initial decision in which he sustained the agency's two charges-i.e., careless or reckless operation of an aircraft and violation of Federal Aviation Administration regulations regarding clearance for landing-but mitigated the removal action to a one-grade demotion. The Board

denied the agency's petition for review of the initial decision. *Caryl v. Department of the Treasury,* 53 M.S.P.R. 202 (1992).

The appellant timely filed a motion for attorney fees. Addendum File (AF), Tab 1; *see also* AF, Tab 7, to which the agency responded in opposition. AF, Tab 4. In an addendum initial decision, the administrative judge found that the appellant had incurred attorney fees and was the prevailing party in the appeal, and that an award of fees was warranted in the interest of justice. Addendum Initial Decision (AID) at 3-4, AF, Tab 8. The administrative judge determined that the appellant's request for $19,662.50 in legal fees, based upon a formula of 157.3 hours at the rate of $125.00 per hour, and $103.45 in allowable costs, was reasonable, *id.* at 5-6, and that a 20 percent enhancement of the lodestar fee, in the amount of $3,932.50, was warranted as compensation for the contingent nature of the appellant's fee agreement. *Id.* at 6-7.

The agency has timely petitioned for review of the addendum initial decision, asserting that the administrative judge erred by: (1) Finding an award of fees warranted in the interest of justice; and (2) awarding an enhancement of the lodestar amount. Addendum Petition for Review File (APFRF), Tab 1. The appellant has timely responded in opposition to the petition. *Id.,* Tab 3.

ANALYSIS

The administrative judge correctly found that an attorney fee award was warranted in the interest of justice.

The administrative judge found that an award of fees was warranted in the interest of justice because the agency "knew or should have known" that its penalty selection, removal, would not be upheld on appeal. AID at 4; *see Allen v. United States Postal Service,* 2 M.S.P.R. 420, 434-35 (1980).

In its petition, the agency argues that the administrative judge erred because his inquiry into the "interest of justice" issue did "not go beyond a perfunctory finding of mitigation." APFRF, Tab 1 at 7. The agency adds that "[s]uch an abdication of [5 U.S.C. §] 7701(g)(1) and implementing Board regulatory control would result in attorney fee awards in all cases except those in which initial employee sanctions are not disturbed to any degree." *Id.* (footnote omitted).

In *Lambert v. Department of the Air Force,* 34 M.S.P.R. 501 (1987), the Board stated that:

> [F]ees will generally be warranted under [the "knew-or-should-have-known"] category when all of the charges are sustained and yet the Board mitigates the penalty imposed, unless the Board's decision to mitigate is based upon evidence that was not presented before the agency.

Id. at 507; *see also Cisneros v. United States Postal Service*, 49 M.S.P.R. 695, 699 (1991).

In *Rose v. Department of the Navy,* 47 M.S.P.R. 5, 10-11 (1991), the Board considered arguments such as those raised by the agency in its petition. There, the Board specifically concluded, however, that a proper analysis under *Lambert* neither applies a per se rule[1] nor fails to apply the attorney-fee statute correctly. *Id.*

Thus, in *Dunn v. United States Postal Service,* 49 M.S.P.R. 144, 147-48 (1991), the Board denied an award of fees, holding that the mitigation of the penalty did not in itself warrant a finding that an award of attorney fees was warranted in the interest of justice in that case.[2] Additionally, in *Nickerson v. United States Postal Service,* 55 M.S.P.R. 92 (1992), the Board made a reasoned comparison of the pertinent factors of the case-in which it had upheld the administrative judge's mitigation of the penalty-to the circumstances in *Lambert* and *Dunn,* in reaching its conclusion that the circumstances in *Nickerson* demonstrated that an award of attorney fees was warranted in the interest of justice. *Nickerson,* 55 M.S.P.R. at 94.

In this instance, the administrative judge made an individualized rather than a pro forma determination, noting that he:

> [B]ased [his] decision to mitigate on the same evidence that the agency had before it at the time it imposed the removal, namely the severity of the incidents of misconduct and the appellant's past disciplinary record as balanced against his lengthy Federal service and potential for rehabilitation.

AID at 4. He added that the agency's argument that fees were not warranted under the "knew-or-should-have-known" criterion was "merely a continuation of its sincere disagreement with [his] mitigation decision." *Id.*

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[1] In *Rose,* 47 M.S.P.R. at 10-11, the Office of Personnel Management argued, inter alia, in requesting reconsideration of the Board's holding in *Rose v. Department of the Navy,* 36 M.S.P.R. 352, 355, *recon. denied,* 39 M.S.P.R. 278 (1988), that the Board had applied a per se rule providing that where all the charges are sustained but the penalty is mitigated, mitigation of the penalty, in itself, is a circumstance which warrants an award of attorney fees in the interest of justice unless the decision to mitigate is based upon evidence that was not presented before the agency.

[2] The Board's decision in *Dunn* was reversed by a nonprecedential decision of the United States Court of Appeals for the Federal Circuit. *Dunn v. United States Postal Service,* 960 F.2d 156 (Fed.Cir.1992) (Table).

Although the agency continues to set forth its "sincere disagreement" with the Board's mitigation in its petition, arguing thereby that it could not have known that the penalty of removal would not be upheld on appeal, APFRF, Tab 1 at 8, we find that the agency has failed to demonstrate that the administrative judge erred in: (1) His analysis of the individual factors pertaining to this case, AID at 4; (2) his determination therefrom that the circumstances of the case fall within the holding of *Lambert, id.;* or (3) his conclusion that all of the factors showing that the penalty of removal was unreasonable were possessed by the agency when it took its action. *Id.; see Nickerson,* 55 M.S.P.R. at 94.

Accordingly, we discern no basis upon which to disturb the administrative judge's finding that an award of attorney fees is warranted in the interest of justice.[3]

No enhancement of the lodestar amount may be awarded.

As we have indicated, the administrative judge awarded the appellant's counsel an enhancement of his fee, and the agency has contested this matter in its petition for review. It is unnecessary for us to address the arguments raised by the parties, however, because, subsequent to the issuance of the addendum initial decision, the United States Supreme Court held, in *City of Burlington v. Dague,* 505 U.S. 557 (1992), that fee-shifting statutes providing for a reasonable fee award to a party prevailing against the Federal government do not permit enhancement of a fee award to reflect the fact that a party's attorneys were retained on a contingent-fee basis. Consistent with *Dague,* the Board recently held that no contingency enhancement may be awarded under 5 U.S.C. § 7701(g)(1) or (2), and overruled its earlier decisions finding to the contrary. *See Clark v. Department of the Army,* 55 M.S.P.R. 76, 80 (1992); *Pecotte v. Department of the Air Force,* 55 M.S.P.R. 165, 169 (1992).

Accordingly, we reverse the administrative judge's award of a 20 percent enhancement to the lodestar fee in the amount of $3,932.50.

ORDER

We ORDER the agency to pay the attorney of record $19,662.50 in fees and $103.45 in allowable costs. The agency must complete this action within 20 days of the date of this decision. *See generally* 5 U.S.C. § 1205(a)(2).

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[3] In its petition, the agency states that it "contests neither the lodestar calculations nor the allowable costs in the analysis portion of the addendum initial decision." APFRF, Tab 1 at 9 n. 3. Thus, we will not disturb the administrative judge's findings with regard to these matters.

We also ORDER the agency to inform the appellant and the attorney of all actions taken to comply with the Board's order and the date on which it believes it has fully complied. *See* 5 C.F.R. § 1201.181(b) We ORDER the appellant and the attorney to provide all necessary information that the agency requests in furtherance of compliance. The appellant and the attorney should, if not notified, inquire as to the agency's progress. *Id.*

Within 30 days of the agency's notification of compliance, the attorney may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the attorney believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance. *See* 5 C.F.R. § 1201.182(a).

This is the final order of the Merit Systems Protection Board in this motion for attorney fees. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.